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November 13, 1997

Ms. Regina Keeney
Chief, International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 830
Washington, D.C. 20554

IB Docket No. 96-220

Dear Ms. Keeney:

This letter is submitted on behalf of Leo One USA Corporation ("Leo One USA"), a pending applicant for a license in the Non-Voice, Non-Geostationary Mobile Satellite Service ("NVNG MSS") second round application processing round, also known as the "Little LEO" proceeding. As you know, on October 15, 1997 the Federal Communications Commission released a *Report and Order* in IB Docket 96-220 adopting certain technical rules relating to the use of currently allocated Little LEO spectrum.¹ This *Report and Order* is based on a spectrum sharing arrangement among all pending Little LEO applicants and will result in the elimination of mutual exclusivity and the resolution of the second Little LEO processing round. Appendix C to the *Report and Order* indicates that because the spectrum sharing plan and technical rules and policies adopted by the *Report and Order* are likely to result in an annual effect on the economy of \$100 million or more, the Commission believes that this is a major rule under the Contract with America Advancement Act of 1996 ("the Act"). The *Report and Order* was published in the Federal Register on November 3, 1997² and the new Little LEO rules are now scheduled to go into effect, absent Congressional action, on January 2, 1998. As discussed below, although Leo One USA believes that the *Report and Order* does not represent a major rule under the Act, it recognizes that given the effective date of the *Report and Order*, it would be fruitless to seek reconsideration of that issue. Nevertheless, Leo One USA remains extremely concerned about the potential deleterious impact of even a minimal delay in licensing second round Little LEO systems. It therefore urges the Commission to release an Order granting Leo One USA an NVNG MSS license immediately upon finding Leo One USA to be qualified to hold a Little LEO license. However, to insure compliance with the Act, Leo One USA suggests that such license not take effect until the new Little LEO rules adopted in the *Report and*

¹ See *Report and Order* in IB Docket No. 96-220 (released October 15, 1997) ("*Report and Order*").

² 62 F.R. 59293 (1997).

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Order become effective. Immediately issuing licenses to Leo One USA and any other qualified applicants will help facilitate the funding and implementation of these proposed NVNG MSS systems. In this respect it is fully consistent with the underlying goal of the Act to create a more hospitable regulatory environment for businesses.

I. BACKGROUND

Leo One USA filed an application in 1993 requesting authority to construct, launch and operate an NVNG MSS system. Subsequently, seven other parties submitted applications seeking additional NVNG MSS licenses or enhancements to existing licenses. In October 1996 the Commission issued a *Notice of Proposed Rulemaking* that proposed certain rules that would facilitate the resolution of the pending NVNG MSS proceeding. On September 19, 1997 all the pending applicants submitted a Joint Proposal that would resolve this proceeding and eliminate mutual exclusivity. The *Report and Order* adopts technical rules and a spectrum assignment plan consistent with this Joint Proposal.

The *Report and Order* concludes that the new policies and rules are "major" as defined in the Act and therefore will become effective 60 days after notification to Congress or publication in the Federal Register, whichever is later. It is our understanding that the *Report and Order* was submitted to Congress in late October, and it was published in the Federal Register on November 3, 1997. Thus, the *Report and Order* is scheduled to go into effect on January 2, 1998. At present, the Commission staff is considering delaying issuance of license orders for new Little LEO systems until after the sixty day Congressional review period has expired. Such a delay is unnecessary and will result in irreversible harm to Leo One USA.

Leo One USA is currently in the process of implementing its business plan for its proposed system. A significant impediment to obtaining international partners and customer commitments and developing the capital structure for the business is the lack of an FCC license. Today, however, the financial markets are ripe for satellite projects such as that proposed by Leo One USA. As I am sure you understand, the capital markets are volatile and any additional delay could have an adverse impact on Leo One USA. For instance, if the stock market experiences a precipitous decline it will have a direct impact on the availability of capital. Thus, even a ten day delay puts Leo One USA at risk. Moreover, continued delay will only harm new entrants while providing the existing NVNG MSS FCC licensee additional time to solidify its competitive advantage. This is contrary to the public's interest in the development of a robust competitive market for NVNG MSS services. Leo One USA therefore urges the Commission to take the appropriate actions to eliminate any further delay in licensing new competitive Little LEO systems.

II. DISCUSSION

A. The Commission Should Issue Leo One USA a License Effective Upon the Expiration of the Sixty Day Congressional Review Period.

In order to facilitate the rapid introduction of new NVNG MSS systems, Leo One USA urges the Commission to release an Order granting it a license immediately upon processing the pending Leo One USA application. However, to insure compliance with the Act, this license should not become effective until the *Report and Order* becomes effective. This approach will give Leo One USA the surety that it will receive a valid FCC license, and the only risk it will have to bear is that Congress will overturn the *Report and Order*. As discussed below, this approach actively promotes the intent underlying the Act to eliminate regulatory barriers to small businesses.³

In the past, the Commission has refused to issue conditional licenses that are immediately effective unless a joint resolution of disapproval is passed by Congress.⁴ However, the instant case is different. Leo One USA is not asking the Commission to issue a license that is effective when issued, subject only to invalidation should a joint resolution be passed. Rather, Leo One USA is requesting the Commission to issue a license that has *no effect* until the sixty day Congressional review period is over and the *Report and Order* enters into effect. The Commission would not be issuing a conditional license or confirming any rights; in fact, the Commission would not be issuing a valid license at all. The Commission would only be providing Leo One USA with a piece of paper that has no legal effect until the end of the sixty day review period. Thus, the Commission would not be acting in a manner that could be viewed as undermining, or circumventing, the authority of Congress.

Although having no legal effect, a license effective upon the expiration of the sixty day Congressional review period would have significant practical and symbolic effects. From a practical perspective, such a license would enable Leo One USA to confidently seek the funding necessary to finance its Little LEO system. Leo One USA also would be in a much stronger bargaining position, and would be able to negotiate more effectively with potential investors, vendors and international partners. Additionally, from a symbolic perspective, such a license would demonstrate the Commission's commitment to the advancement of the satellite industry. Telecommunications enterprises in the United States would be viewed, both domestically and internationally, as important and viable players in the global marketplace.

³ Leo One USA was classified as a small business in the *Report and Order*. See *Report and Order* at Appendix D.

⁴ For example, in 1996, the Commission declined to issue Teledesic Corporation a license conditioned on the 28 GHz Band Plan taking effect without a joint resolution of disapproval. See *Application of Teledesic Corporation, etc.*, File Nos. 22-DSS-PL/A-94, 43-SAT-AMEND-95, and 127-SAT-AMEND-95.

B. Immediate Issuance of License Would be Consistent with the Legislative Intent of the Act.

The licensing approach described above would promote rather than hinder the legislative intent of the Act. The legislative history of the Act demonstrates that it was intended to help small business by eliminating unnecessary, burdensome, and costly administrative regulations. The Act was specifically designed to create a regulatory environment *hospitable* to business. Senator Harry Reid, co-sponsor of the amendment providing for Congressional review of agency rulemaking, asserted that the purpose of the review period was to ensure that "Government [was] not . . . an obstacle to commerce and competition."⁵

Waiting to issue licenses until the *Report and Order* becomes effective would have an effect directly opposite to the intent of the Act. In this particular case, the requirements of the Act would impose *additional* burdens on business and would weaken the position of American telecommunications companies in both the domestic and international arena. Thus, the Commission should conclude that any delay in its implementation would not serve the intended purpose of the Act. Consequently, the Commission should immediately issue Leo One USA a license that is effective when the *Report and Order* becomes effective.

C. The *Report and Order* Is Not Subject to the Act.

Leo One USA continues to believe that there are compelling reasons to conclude that the *Report and Order* is not subject to the provisions of the Act. Thus, the licensing approach described above should be considered to enhance the legislative mandate of the Act.

1. The *Report and Order* Is Not a Rule Under the Administrative Procedure Act.

The *Report and Order* is not a "rule" as defined by the Administrative Procedure Act ("APA"), and thus, is excluded from the coverage of the Act. The Act provides that the term "rule" has the meaning given it in section 551 of the APA.⁶ The APA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and *future effect*"⁷ The *Report and Order* adopted by the Commission does not have "future effect" as it only applies to the

⁵ 142 CONG. REC. S2162 (March 15, 1996). Senator Kay Bailey Hutchinson also noted the purpose of the Congressional review procedures was to "free small businesses to be able to grow and prosper[.]" thus allowing for "more jobs [to] be available for the working people of our country." 142 CONG. REC. at S2163.

⁶ 5 U.S.C. § 804(3).

⁷ 5 U.S.C. § 551(4) (1996) (emphasis added).

applicants for a license in the present Little LEO proceeding. The *Report and Order* has absolutely no effect on other applicants in future proceedings. Because the *Report and Order* is an agency statement with no future effect, the Act does not apply.

2. The *Report and Order* Is Not a Rule Under the Act.

Even if the items adopted in the *Report and Order* are deemed a "rule" under the APA, they are not a "rule" as defined by the Act, and thus, are excluded from the coverage of the Act. The Act provides that the term "rule" does not include "any rule of *particular applicability*"⁸ The *Report and Order* adopted rules of "particular applicability," which are thus excluded from the Act's coverage. As stated previously, the *Report and Order* relates solely to the license applicants in the Little LEO proceeding. The *Report and Order* is not really a rule, but rather, is more analogous to an adjudication by rulemaking. Being a rule with no general application, the *Report and Order* should be excluded from the coverage of the Act.

3. The *Report and Order* Is Not a Major Rule.

Even if the *Report and Order* represents a rule as defined by the Act, it *does not* represent a "major rule." The Act provides that the term "major rule" is any rule that is found to result in, or is likely to result in:

- (1) An annual effect on the economy of \$100 million or more; or
- (2) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.⁹

First, the *Report and Order* is not a "major rule" because it does not have an annual effect on the economy of \$100 million or more. The *Report and Order* does not provide for the opportunity to obtain a license to operate a Little LEO satellite system; such rules have already been promulgated. The *Report and Order* only establishes various technical requirements, applicable to the licensing scheme already in effect.¹⁰ Thus, the *Report and Order* has no monetary effect on the domestic economy.

⁸ 5 U.S.C. § 804(3) (emphasis added).

⁹ 5 U.S.C. § 804(2).

¹⁰ See 62 Fed. Reg. 6,090 (1997) (noting rule establishing numerous technical amendments to Department of Labor's regulations was not "major rule").

Additionally, the *Report and Order* is not a "major rule" because it does not have a significant adverse effect on competition, employment, investment, productivity, or innovation in the United States. In fact, quite the opposite is true. The *Report and Order* has a significant *beneficial* effect on employment, investment, productivity, and innovation in the United States. Implementation of the *Report and Order* will allow NVNG MSS enterprises to move forward with their business plans, thus creating more jobs and injecting more revenue into the domestic economy. Such a positive economic impact is in the best interest of all Americans.

D. The Commission Has Good Cause To Find That the Sixty Day Congressional Review Period Should Not Apply.

Even if one was to conclude that the *Report and Order* is a "major rule" under the Act, the Commission could, nevertheless, mandate that the *Report and Order* take effect immediately. As previously noted, the Act provides that, notwithstanding the Congressional review procedures outlined in the Act, an agency can for "good cause" declare a rule to be effective immediately. Both the Department of Commerce and the Department of Health and Human Services have so declared in prior proceedings.

In one proceeding, the Department of Commerce concluded that there was good cause to declare a major rule to be effective immediately, as it was enacted to protect the national security and foreign policy interests of the United States, and to streamline export controls.¹¹ Any delay was found to be contrary to the public interest. In another proceeding, the Department of Health and Human Services found that, in light of the impending adjournment of Congress, any delay in the effective date of a final rule would be contrary to both the Act's intent and the public interest. The agency concluded that there was good cause to declare the rule effective immediately.¹²

Similarly, in the instant proceeding the Commission would have good cause to waive the sixty day Congressional review period and declare the *Report and Order* effective immediately. Any delay in the implementation of the *Report and Order* would have an adverse effect not only on Leo One USA, but on the public's interest in the development of a competitive market for Little LEO services. Such a result would be unnecessary and contrary to the public interest.

¹¹ See 61 Fed. Reg. 68,572 (1996).

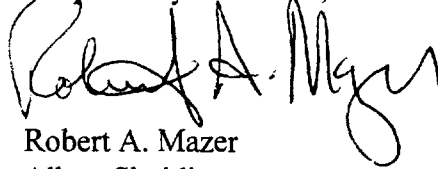
¹² 61 Fed. Reg. 59,490 (1996); see also 61 Fed. Reg. 59717 (1996) (declaring final notice of update to Medicare physician fee schedule to be effective immediately notwithstanding fact it was "major rule").

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III. CONCLUSION

For the reasons discussed above, Leo One USA urges the Commission to immediately issue it a license, with such license not being effective until the *Report and Order* in IB Docket No. 96-220 becomes effective. This action is fully consistent with the underlying intent of the Act in that it will promote rather than hinder the successful implementation of the Leo One USA NVNG MSS system.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert A. Mazer". The signature is fluid and cursive, with the first name "Robert" being more prominent.

Robert A. Mazer
Albert Shuldiner
Megan Troy
Counsel to Leo One USA Corporation

cc: Christopher J. Wright
Laurence H. Schecker
Ruth Milkman
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Parties of Record